INTERIOR BOARD OF INDIAN APPEALS

Lyle D. and Donna J. Griffith v. Acting Portland Area Director,
Bureau of Indian Affairs

19 IBIA 14 (10/19/1990)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

LYLE D. and DONNA J. GRIFFITH
v.
ACTING PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-128-A Decided October 19, 1990

Appeal from the denial of a loan guaranty.

Referred to Assistant Secretary - Indian Affairs.

1. Board of Indian Appeals: Jurisdiction

Once an appeal is properly docketed by the Board of Indian Appeals in accordance with 43 CFR 4.336, the Board can be divested of jurisdiction only by the Secretary of the Interior or the Director of the Office of Hearings and Appeals, pursuant to 43 CFR 4.5, or by the Board's finding pursuant to 43 CFR 4.337(b) that an issue or issues raised in the appeal require the exercise of discretion committed to the Bureau of Indian Affairs.

2. Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions

The Board of Indian Appeals has held that it lacks authority to substitute its judgment for that of the Bureau of Indian Affairs when the Bureau has been granted discretion over the subject matter of an appeal; i.e., when there is "no law to apply." The Board has jurisdiction to determine whether a BIA decision is properly characterized as discretionary and whether all legal prerequisites to the exercise of discretion have been met.

3. Board of Indian Appeals: Generally

The Board of Indian Appeals serves to provide independent, objective administrative review of decisions of Bureau of Indian Affairs' officials and to prevent the politicization of those decisions.

4. Board of Indian Appeals: Jurisdiction--Indians: Financial Matters: Financial Assistance

In general, decisions concerning whether a request for a loan guaranty or grant under one of the business development programs operated by the Bureau of Indian Affairs are committed to the discretion of the Bureau. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

APPEARANCES: Lyle D. and Donna J. Griffith, pro se; Michael E. Drais, Esq., Office of the Solicitor, Pacific Northwest Region, Portland, Oregon, for the Portland Area Director; Dr. Eddie F. Brown, Assistant Secretary - Indian Affairs, pro se.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellants Lyle D. and Donna J. Griffith seek review of a June 12, 1990, decision of the Acting Portland Area Director, Bureau of Indian Affairs (BIA; Area Director), denying their application for a guaranteed loan under the Indian loan guaranty program. For the reasons discussed below, the Board of Indian Appeals (Board) refers the matter to the Assistant Secretary - Indian Affairs (Assistant Secretary) pursuant to 43 CFR 4.337(b).

Background

By letter dated May 4, 1990, appellant Lyle D. Griffith, an enrolled member of the Oglala Sioux Tribe, and his wife, appellant Donna J. Griffith, through the American Bank of Commerce (bank), Boise, Idaho, applied to BIA for a 90-percent guaranteed loan in the amount of $250,000 for the purpose of developing the Hot Lake recreational vehicle resort in LaGrande, Oregon. The official application apparently was preceded by extensive discussions among BIA Umatilla Agency and Portland Area Office staff, appellants, the bank, and appellants' accountant. By memorandum dated May 8, 1990, the Umatilla Agency Superintendent transmitted the application package to the Area Director with the recommendation that the loan guaranty be approved.

After review in the Area Office, by letter dated June 12, 1990, the Area Director informed the bank that the application was being denied. As grounds for denial, the Area Director stated:

1. The Griffiths have outstanding loans and other obligations they have entered into for various developments including the R.V. Park. Due to this past borrowing there is insufficient collateral to support this loan with only a second position available on what is considered to be the primary security

for this loan. Past debt is now due and loan funds requested are insufficient to retire this debt so that a first position could be obtained for security on this loan.

2. In addition the largest percentage of the use of these funds are related to past debt rather than the enhancement and development of the enterprise.

3. With this large debt load, future prospects of the enterprise does [sic] not provide reasonable assurance of repayment of this loan.

4. In relation to the bank's commitment letter to Mr. Griffith, the minimum 10 percent average compensating demand deposit agreement would need to have been a part of the 90 percent guaranty. This plus fees, packaging costs, and a loan due to the bank would have decreased further funds for the development of the R.V. Park and retirement of past debts.

(Letter at 1).

The Board received appellants' notice of appeal and statement in support of their appeal on July 13, 1990. By notice of docketing dated August 14, 1990, interested parties were informed of their right to file briefs with the Board. No briefs have been filed. Instead, on September 4, 1990, the Board received a telefax copy of a letter from appellants, stating that they had discussed their appeal with officials in the Washington, D.C., office of BIA, who were "receptive to a re-review of the request for funding consideration" (Letter at 1), and requesting that the Area Director's decision be vacated and their appeal be referred to the Washington, D.C., BIA office. Appellants stated that their request was being made on instructions from an official in the Washington, D.C., BIA credit office. The original letter was received on September 10, 1990.

[1] By order dated September 4, 1990, citing Kiowa, Comanche & Apache Intertribal Land Use Committee v. Acting Anadarko Area Director, 18 IBIA 229 (1990), the Board denied the request, stating that duly promulgated Departmental regulations provided only two procedures for removing cases from the Board's jurisdiction after they have been properly docketed in accordance with 43 CFR 4.336. 43 CFR 4.5 allows the Secretary of the Interior or the Director of the Office of Hearings and Appeals to assume jurisdiction over any case pending before the Board; while 43 CFR 4.337(b) allows issues requiring the exercise of discretion committed to BIA to be referred to the Assistant Secretary. Since neither of these procedures was being followed in appellants' request, the Board found that it had no authority to grant that request.

On September 25, 1990, the Board received a telefax copy of a letter from the Assistant Secretary requesting that the case be referred to him pursuant to 43 CFR 4.330(b) because it involves the exercise of

discretionary authority under BIA's loan guaranty program. 1/ The original letter was received on September 28, 1990.

On October 9, 1990, the Board received a response to its September 4, 1990, order from the Area Director. The Area Director indicated his belief that the appeal was properly before the Board, which had jurisdiction to determine whether all legal prerequisites to the exercise of discretion had been met. Further, the Area Director stated his expectations that once briefing had been concluded, the Board would hold that this appeal should be dismissed pursuant to 43 CFR 4.337(b).

[2] The extent of the Board's responsibility in reviewing BIA decisions involving the exercise of discretion has been the subject of much discussion. The Board has interpreted this limitation on its authority in the same manner as have the Federal courts, i.e., a discretionary decision over which the Board lacks jurisdiction is one where there is "no law to apply." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971); Urban Indian Council, Inc. v. Acting Deputy Assistant Secretary - Indian Affairs (Operations), 11 IBIA 146 (1983); Billings American Indian Council v. Deputy Assistant Secretary - Indian Affairs (Operations), 11 IBIA 142 (1983). In the cited cases, the Board further held that whether a decision is properly characterized as discretionary is a legal question subject to its review, and that it has jurisdiction to review any legal prerequisites to an ultimate exercise of discretion, such as an alleged violation of statute or regulation. See also Price v. Portland Area Director, 18 IBIA 272 (1990).

[3] These rules were developed in view of the Department's policy concerning the function performed by the Office of Hearings and Appeals and the reason for review of administrative decisions of BIA officials by the Board. As stated in the preamble to the new appeal regulations published in 54 FR 6483, 6484 (Feb. 10, 1989):

> The Office of Hearings and Appeals was created as a separate office within the Office of the Secretary of the Interior in 1970 to provide independent, objective administrative review of decisions issued by the Department's various program Bureaus and Offices. In promulgating the initial regulations providing

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1/ Section 4.330(b) states: "Except as otherwise permitted by the Secretary or the Assistant Secretary - Indian Affairs by special delegation or request, the Board shall not adjudicate: * * * (2) Matters decided by the Bureau of Indian Affairs through exercise of its discretionary authority."

Section 4.337(b) further provides:

"Where the Board finds that one or more issues involved in an appeal or a matter referred to it were decided by the Bureau of Indian Affairs based upon the exercise of discretionary authority committed to the Bureau, and the Board has not otherwise been permitted to adjudicate the issue(s) pursuant to § 4.330(b) of this part, the Board shall dismiss the appeal as to the issue(s) or refer the issue(s) to the Assistant Secretary - Indian Affairs for further consideration."

> for review of administrative decisions of the Bureau of Indian Affairs, the Department stated: "Exercise of the Secretary's review authority by the Board of Indian Appeals will ensure impartial review free from organizational conflict in that the Board is part of the Office of Hearings and Appeals in the Office of the Secretary and as such is independent of the Bureau of Indian Affairs." 40 FR 20819 (May 13, 1975).
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> It is also recognized, however, that there are some decisions involving Indians and Indian tribes that involve policy considerations that cannot adequately be addressed through the usual appeal procedures. It is anticipated that the Assistant Secretary - Indian Affairs will infrequently exercise the authority to assume jurisdiction over an appeal. The Assistant Secretary - Indian Affairs is aware that such assumption of jurisdiction will operate to alter the legitimate expectations of the parties as to normal processing of their appeals.

The Board thus serves both to provide independent, objective review and to prevent the politicization of final BIA decisions.

[4] The general rules developed for review of BIA discretionary decisions have been followed in cases arising under BIA's various business loan and grant programs. See, e.g., Aubertin Logging & Lumber Enterprises v. Acting Portland Area Director, 18 IBIA 307 (1990). In Aubertin and similar cases, the Board has held that the ultimate decision as to whether a loan guaranty or grant should be approved is discretionary and that it will not substitute its judgment for that of BIA on that decision. It has also held, however, that it has the initial responsibility to determine whether all legal prerequisites to the final exercise of discretion have been met before taking any additional steps that may be necessary in the matter, including referring the case to the appropriate BIA official for any required further action.

Therefore, in response to the Assistant Secretary's request that this appeal be transferred to him, the Board reviewed the record in the present case, including the Area Director's decision and October 1990 submission, and the detailed discussion set forth in appellants' notice of appeal.

On the basis of the record presently before it, the Board finds no legal error in the Area Director's decision. Appellants' arguments also do not raise legal issues. Ordinarily, the Board would dismiss such an appeal. The Board, therefore, assumes that the Assistant Secretary's request that this case be transferred to him is based upon his desire to ensure that the Area Director properly exercised his discretionary authority in determining, for example, that there was not a reasonable assurance of repayment. Such a determination is, of course, an essential part of the BIA deciding official's responsibilities, which must be properly exercised independent of

and separate from a financial institution's decision of whether to issue a loan if the guaranty is given. See 25 U.S.C. § 1484 (1988); 25 CFR 103.15(b). 2/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1 and 4.337(b), and in accordance with the Board's decision in Price v. Portland Area Director, 18 IBIA 272 (1990), this appeal from the June 12, 1990, decision of the Acting Portland Area Director is referred to the Assistant Secretary - Indian Affairs for appropriate consideration.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

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2/ 25 U.S.C. § 1484 (1988) provides: "Upon approval, the Secretary shall issue a certificate as evidence of the guaranty. Such certificate shall be issued only when, in the judgment of the Secretary, there is a reasonable prospect of repayment."